

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner

In the Matter of a Proposed Plan for
Implementing the Biomass Mandate and
Amendments to Power Purchase Agreements

ISSUE DATE: September 5, 2003

DOCKET NO. E-002/M-03-306

ORDER APPROVING EXTENSION OF
FIBROMINN POWER PURCHASE
AGREEMENT

PROCEDURAL HISTORY

On May 8, 2001, the Commission issued an order approving a power purchase agreement (PPA) between Northern States Power Company d/b/a Xcel Energy (Xcel) and FibroMinnesota, L.L.C. (Fibrominn). The PPA provides for Xcel to buy from Fibrominn up to 50 megawatts (MW) of electricity from a generator that uses poultry litter as its primary fuel.¹ The PPA was intended to fulfill part of the statutory mandate that Xcel acquire 125 MW of electricity generated from biomass² by December 31, 2002.³

On February 27, 2003, Xcel petitioned the Commission to, among other things, extend the "Effective Date" in the Fibrominn PPA to October 31, 2003.

On March 6, 2003, the Commission solicited comments on this and other issues related to implementing the biomass mandate.

By March 31, 2003, the Commission had received comments on the Fibrominn PPA from Itasca Power Company (Itasca Power) and the Minnesota Department of Commerce (the Department). By April 18, the Commission had received reply comments from the Department, Itasca Power, Minnesotans for an Energy Efficient Economy (ME3) and Xcel. The Commission also received other comments pertaining to issues beyond the Fibrominn PPA.

The Commission met on July 10, 2003, to consider this matter.

¹ *In the Matter of Xcel Energy's Petition for Approval of a Biomass Power Purchase Agreement With FibroMinnesota, L.L.C. for 50 MW of Biomass Power*, Docket No. E-002/M-00-1169 ORDER APPROVING BIOMASS POWER PURCHASE AGREEMENT AND REQUIRING ANNUAL REPORTING (May 8, 2001 Order).

² "Biomass" is defined at Minn. Stat. § 216B.2424.

³ Minn. Stat. § 216B.2424, subd. 5.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

The Fibrominn PPA provides for the long-term purchase of 50 MW of electricity generated primarily from poultry litter. In the PPA, Fibrominn agreed to secure financing or begin continuous construction on the plant by July, 2002 (the “Effective Date”), and to be operational by December 31, 2002. The PPA provides for remedies if the project fails to meet deadlines.

But the PPA also contains a “force majeure” clause permitting terms to be altered in the event of certain unforeseen circumstances. According to Xcel, force majeure events have already caused the Effective Date to be extended to July 31, 2003. Fibrominn and Xcel seek Commission approval to extend the schedule an additional three months, to October 31, 2003.

II. PARTIES’ COMMENTS

In response to the Commission’s March 6 solicitation, parties commented on a variety of matters related to the biomass mandate. The following discussion addresses only the remarks relevant to the Fibrominn PPA.

A. Fibrominn

Fibrominn filed no comments in this matter but appeared at the hearing. FibroMinnesota, L.L.C. is a subsidiary of Fibrowatt LLC, the U.S. subsidiary of Fibrowatt Limited of the United Kingdom. Fibrominn reports launching, through its parent companies, four plants similar to the project under development in Minnesota.

Fibrominn seeks to extend to October 31, 2003, the date by which it will have financing for the project. Since signing the initial PPA, Fibrominn has encountered two unexpected obstacles. First, it took longer to obtain the necessary permits from the U.S. Environmental Protection Agency and the Minnesota Pollution Control Agency (MCPA) than anticipated. Second, terrorism and conflict in Iraq have made people less eager to make long-term investments, especially concerning energy. The combined effects of these two phenomena have slowed Fibrominn’s progress, making the original schedule impossible.

However, Fibrominn has made progress. It now has the necessary permits, and is in negotiations with multiple groups of potential investors. Extending the Effective Date to October 31, 2003, should enable Fibrominn to secure the financing to proceed with the project.

B. Itasca Power

Itasca Power describes itself as a cogeneration equipment and project development company. Itasca Power questions why Xcel has not fulfilled the biomass mandate on time, and urges the Commission to take stronger measures to implement this mandate.

Itasca Power questions whether a state agency has the authority to grant an extension to a PPA designed to meet a statutory deadline. Additionally, Itasca Power expresses concern about the effect on the capital investment climate in Minnesota if the Commission were to conclude that delays in acquiring permits from state agencies constitutes a basis for changing contract deadlines.

If the Commission is persuaded that an extension may be warranted, Itasca Power recommends that the Commission withhold the extension until after Xcel has substantiated a realistic operational date for the project, and after the Commission has received, reviewed and approved the project's cost structure. Additionally, Itasca Power recommends adding the following provisions to the Fibrominn PPA:

- A statement of the project's size, output and cost if the extension is granted, compared to the size, output and cost of the project if it had gone on-line as originally proposed.
- A finding that Xcel forfeits any liquidated damages under the PPA.
- A finding that changes in PPA dates require Commission approval, and the fact that this project has failed to meet its initial 2002 deadline renders the project out of conformance with the requirements of the biomass mandate.
- A finding that delays in obtaining permits from the MPCA do not constitute force majeure events justifying an extension in the PPA timeline.

C. Minnesotans for an Energy Efficient Economy

ME3 expresses scepticism about Xcel's biomass projects generally. But ME3 argues that terminating the Fibrominn PPA now would be premature given Fibrominn's success in securing operating permits.

D. The Department of Commerce

The Department recommends granting the requested extension and opposes Itasca Power's proposed conditions.

While the Department shares Itasca Power's interest in seeing the biomass mandate implemented, it opposes Itasca Power's proposals for doing so. Withholding the proposed PPA extension would simply cause further delays in getting biomass generation operating.

The Department disputes Itasca Power's legal conclusion that this project is proceeding in violation of the biomass mandate. The Department also disputes Itasca Power's suggestion that extending timelines would violate the PPA. The PPA provides for modifying terms in the event of force majeure events. The Commission approved those provisions. Issues such as the precise application of the force majeure clause, the operation of liquidated damages, or the size and output of the final plant are contractual matters between Fibrominn and Xcel, and do not warrant Commission intervention at this time. Xcel's periodic reports provide an adequate mechanism for monitoring the progress of the Fibrominn project; no additional measures are required.

While the Department recommends granting the extension, it also recommends precluding any further extensions. The Department argues that the proposed extension should be adequate, and any additional delay in securing financing or beginning construction would signal Fibrominn's inability to complete the project.

E. Xcel

Together with Fibrominn, Xcel asks the Commission to approve extending the milestone dates in the Fibrominn PPA. Xcel notes that Fibrominn encountered unexpected delays in acquiring permits and financing. Xcel argues that these circumstances constitute force majeure events justifying changes in the PPA's timeline.

Xcel joins the Department in disputing Itasca Power's claim that the biomass mandate precludes the Commission from granting this request.

But Xcel opposes the Department's recommendation to preclude consideration of any future extension requests. Xcel notes that the Commission-approved PPA contains a force majeure clause entitling Fibrominn to contract modifications under some circumstances. Precluding the possibility of future extensions would effectively alter this part of the PPA. Moreover, Xcel argues, the issue of whether to grant a future extension request is simply not presented for Commission consideration at this time. If any future extension request were to come before the Commission, Xcel would expect the Commission to take the matter up at that time, considering all the facts and circumstances then presented. But until that time, Xcel argues, consideration of this issue is premature.

III. COMMISSION ACTION

The proposed extension has prompted questions about the Commission's authority to grant such extensions, the wisdom of granting the extensions, and the conditions that might attach to any extension. The Commission will address these concerns in turn.

A. Legal Authority

Itasca Power questions whether the biomass mandate gives the Commission the discretion to grant the request for extension. The Commission finds nothing in the mandate to preclude the requested extension. That mandate directs Xcel to –

... construct and operate, purchase, or contract to construct and operate (1) by December 31, 1998, 50 megawatts of electric energy installed capacity generated by farm-grown closed-loop biomass scheduled to be operational by December 31, 2001; and (2) by December 31, 1998, an additional 75 megawatts of installed capacity so generated scheduled to be operational by December 31, 2002.⁴

As the Department and Xcel note, the statute merely directed Xcel to acquire electricity from biomass generators *scheduled* to be operational by 2001 and 2002. The fact that the Fibrominn project did not actually begin operations in 2002 is not relevant. The statute did not demand omniscience; it merely required Xcel to act in good faith to secure biomass capacity in a timely fashion. The Commission has no evidence that Xcel has done otherwise.

⁴ Minn. Stat. § 216B.2424, subd. 5(a).

The Commission has already found that “[t]he Fibrominn facility is scheduled to be operational by December 31, 2002, *meeting the statutory deadline*.”⁵ In sum, the Fibrominn project has complied with the biomass mandate, and that mandate was never intended to preclude this Commission from acknowledging practical difficulties and making practical accommodations regarding Xcel’s biomass contracts.

B. Merits of Extension Request

Even if the Commission has the authority to grant the requested extension, Itasca Power questions the wisdom of doing so. In particular, Itasca Power suggests that granting the requested extension may harm capital markets in Minnesota. The Commission disagrees. To the contrary, by demonstrating its willingness to work with firms undertaking challenging projects, the Commission’s actions today should enhance people’s willingness to invest in future Minnesota projects.

Having considered the written and oral arguments of the parties, the Commission concludes that the proposal to extend the Fibrominn PPA represents a reasonable response to unanticipated delays beyond the control of any party. Consequently, the request will be approved.

C. Conditions

The only remaining issue involves the conditions under which the approval should be granted.

Itasca recommends delaying the approval pending Xcel forecasting the date by which the plant will be operational, and updating the plant’s cost and size estimates. The Commission will decline this proposal. The Fibrominn project is behind schedule in part due to Fibrominn’s difficulty in attracting financing. Regulatory ambiguity could only exacerbate that problem. The Commission does not wish to place needless obstacles in the way of this project.

In addition to asking Xcel to make new forecasts, Itasca Power recommends that the Commission modify the PPA to change the force majeure clause or waive Xcel’s claim to liquidated damages. The Commission is not persuaded of the current need for these forecasts, or of the need to modify the PPA. In its May 8, 2001 Order the Commission analyzed and approved this project, including the PPA. The time to reconsider that order has passed. Since that time the content and interpretation of the PPA have been matters largely between Fibrominn and Xcel. Neither of these parties have asked for the Commission’s involvement in interpreting or modifying the PPA. Until the public interest is placed at issue, the Commission will refrain from intervening in that contractual relationship.

Finally, the Commission will decline the Department’s recommendation to bar any future extension requests. The Commission shares the Department’s interest in ensuring that biomass projects be implemented without unwarranted delay. However, as a general matter the Commission is unwilling to pre-judge a party’s petition without considering the facts giving rise to the petition. The Commission will evaluate future extension requests, if any, when they are filed, under the circumstances then prevailing.

The PPA extension requested by Fibrominn and Xcel is approved. The Commission will so order.

⁵ May 8, 2001 Order at 2 (emphasis added).

ORDER

1. The Commission hereby approves the extension to the Fibrominn PPA requested by Fibrominn and Xcel.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).